(16) (12)

Nos. 99-0005 and 99-0029

FILED
NOV 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHRISTY BRZONKALA,
Petitioner,

—v.—

ANTONIO MORRISON, et al.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

—v.—

ANTONIO MORRISON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* ON BEHALF OF INTERNATIONAL LAW SCHOLARS AND HUMAN RIGHTS EXPERTS IN SUPPORT OF PETITIONERS

CATHY ALBISA
RHONDA COPELON*
**Counsel of Record*
International Women's Human Rights Law Clinic
City University of New York School of Law
65-21 Main Street
Flushing, New York 11367
(718) 340-4300

JENNY GREEN
PETER WEISS
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6431

Attorneys for Amici Curiae

5411

INTERNATIONAL LAW SCHOLARS &
HUMAN RIGHTS EXPERTS

AS *AMICI CURIAE*

KELLY DAWN ASKIN
CHARLOTTE BUNCH
ANDREW BYRNES
ROGER S. CLARK
REBECCA J. COOK,
LISA A. CROOMS
ANTHONY D'AMATO
NORMAN DORSEN
ALDA FACIO
RICHARD FALK
JOAN FITZPATRICK
LYNN FREEDMAN
LORENA FRIES-MONLEÓN
PAMELA GOLDBERG
DEAN CLAUDIO GROSSMAN
BERTA ESPERANZA HERNANDEZ-TRUYOL
PAUL HOFFMAN
STEVEN D. JAMAR
DOREAN M. KOENIG
MAIVAN CLECH LAM
HOPE LEWIS
GAY MCDOUGALL
ALICE MILLER
VAHIDA NAINAR
JORDAN PAUST
LINDA J. POOLE
CATHERINE POWELL
JOHN QUIGLEY
MICHAEL RATNER
WILLIAM SCHABAS
MARTIN SCHEININ
RALPH G. STEINHARDT
BETH STEPHENS
DONNA J. SULLIVAN
RICHARD WILSON

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

I. VAWA Is A Constitutional Exercise Of The Congressional "Treaty Power" Which Implements U.S. Obligations Under The International Covenant On Civil And Polit'cal Rights (ICCPR) To Redress Gender-Based Violence 3

A. Congress Is Constitutionally Authorized To Enact Legislation To Fulfill U.S. Treaty Obligations. 3

B. The ICCPR Guarantees The Right To Be Free From Gender-Based Violence and Obligates States Parties To Provide Remedies For Private And Official Gender-Based Violence 4

1. The ICCPR Requires States Parties to Redress Privately Inflicted Gender-Based Violence 5

2. The ICCPR Protects the Right To Be Free From Gender-Based Violence. 7

C. The ICCPR Calls For Judicial Remedies, Such As VAWA, To Redress Gender-Based Violence. 15

D. The Executive's Identification of VAWA As Responsive to U.S. Obligations Under The ICCPR Should Be Given Great Weight..... 15

II. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT VAWA TO IMPLEMENT INTERNATIONAL CUSTOMARY LAW OBLIGATIONS. 17

A. The Define and Punish Clause of the U.S. Constitution Authorizes Congress To Enact Legislation to Fulfill Customary Law Obligations..... 17

B. The Necessary and Proper Clause Authorizes Congress To Confer Article III Jurisdiction On The Federal Courts To Implement Customary Norms..... 20

III. ENSURING THE RIGHT TO BE FREE FROM GENDER BASED VIOLENCE IS AN OBLIGATION UNDER INTERNATIONAL CUSTOMARY LAW..... 22

A. U.S. Courts Have Consistently Recognized The Appropriate Sources For Discerning Customary Law. 22

B. Gender-Based Violence Violates A Customary Norm of International Law. 24

C. The Executive's Recognition Of Its Human Rights Obligation To Redress Gender-Based Violence Through VAWA Is Entitled To Deference. 27

IV. BOTH TREATY AND CUSTOMARY LAW SUPPORT INTERPRETING THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT AS CONFERRING AUTHORITY ON CONGRESS TO PROVIDE REDRESS FOR GENDER-BASED VIOLENCE. 27

TABLE OF AUTHORITIES

CASES — **PAGE**

***Asakura v. City of Seattle*, 265 U.S. 332 (1924)** 3

***Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)** 21

***Blackmer v. United States*, 284 U.S. 421 (1932)** 21

***Boos v. Barry*, 485 U.S. 312 (1988)** 19

***The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)** 2,28

***Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419(1793)** 21

***Coger v. B'd of Regents of the State of Tenn'*, 154 F.3d. 296 (6th Cir. 1998)** 4

***Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997)** 4

***E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983)** 4

***Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980)** ..... *passim*

***Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986), *rev'd on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988).** 18,19

***Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987)** 21

***Frend et al. v. United States*, 100 F.2d 691 (D.C. Cir. 1938) *cert. denied* 306 U.S. 640 (1939)** 19,20

***Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986)** 21,28

***Graham v. Deere*, 383 U.S. 1 (1965)** 20

***Jewish Defense League Inc., et al v. Washington et al.*, 347 F.Supp. 1300 (D.D.C. 1972)** 19

***Jones v. Mayer*, 392 U.S. 409 (1968)** 15

***Kadic v. Karadzic*, 70 F.2d 232 (2nd Cir. 1995), *cert. denied*, *Karadzic v. Kadic*, 518 U.S. 1005 (1996)** 21

***Kolovrat v. Oregon*, 366 U.S. 187 (1961)** 16,

***Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)** 28

***Mathews v. Diaz*, 426 U.S. 67 (1976)** 28

***McCulloch v. Maryland*, 17 U.S. 316 (1819)** 20

***Missouri v. Holland*, 252 U.S. 416 (1920)** 1,3,28

***The Nereide*, 9 U.S. (9 Cranch) 388(1815)** 21

***O'Connor v. U.S.*, 479 U.S. 27, 33 (1986)** 17

The Paquete Habana, 175 U.S. 677 (1900) 2,21,22

Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992) 15

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694 (1st Cir. 1983) 4

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) 16

Trible v. Stone, 187 F.Supp. 483 (D.D.C. 1960)..... 19

United States v. Arjona, 120 U.S. 479 (1887) 18, 19, 21

Verlinden B.V. v. Cenral Bank of Nigeria, 461 U.S. 480 (1983)..... 18

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) 21

Xuncaz v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)..... 21,22

Yakus v. United States, 321 U.S.. 414 (1944)..... 20

INTERNATIONAL CASES

Aydin v. Turkey, Eur. Ct. H.R., 25/09/1997..... 14

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Judgment Sept. 2, 1998) 14

Prosecutor v. Celebici, Case No. IT-96-21-T (Judgement Nov. 16, 1998) 14

Prosecutor v. Furndzija, Case No. IT-95-17/1-T (Judgment Dec. 10, 1998) 14

Velasquez Rodriguez Case, Inter. Am. Ct. H.R, Ser. C, No. 4, OAS/Ser.L/V/III.19, doc. 13 (1988) 6

X & Y v. the Netherlands, Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986)..... 6

CONSTITUTIONS, STATUTES, RULES and LEGISLATIVE REPORTS

U.S. Const. art. I, § 8..... 20

140 Cong. Rec. H4724-02 (1994) 13

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976)..... 18

Statute of the International Court of justice, Art. 38, 59 Stat. 1055 (1945) 22

S. Rep. No. 103-138 (1993)..... 11,12,13

S. Rep. No. 102-249- (1992)..... 19

UNITED NATIONS AND REGIONAL DOCUMENTS AND REPORTS

American Convention on Human Rights, ***entered into force on*** **July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. L/V/II.23 Document Revision 2, 1144 U.N.T.S. 123** 6

Beijing Declaration and the Platform for Action**, General Assembly, Report of the Fourth World Conference on Women, U.N. DOC. A/CONF.177/20 (17 OCT. 1995)** 25

Compilation Of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies**, U.N. Doc. HRI/GEN/1/Rev.2 (29 March 1996)** ..... *passim*

Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/79/Add.50 (3/10/95) 16

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ***entered into force*** **Nov. 20, 1994 (1984)** 13,24

Convention on the Elimination of All Forms of Discrimination Against Women, ***entered into force,*** **Sept. 3, 1981, 1249 U.N.T.S. 20378** 6,9,10

Convention on the Elimination of All Forms of Race Discrimination, ***entered into force*** **Jan. 4, 1969 and** ***ratified by U.S. on*** **Oct. 221, 1994, 660 U.N.T.S. 195 (1966)** 8

Declaration on the Elimination of Violence Against Women**, GAOR Res. 104, 48th Sess. U.N.. Doc. A/Res/48/104 (1994)** ..... *passim*

European Convention for the Protection of Human Rights and Fundamental Freedoms, ***entered into force*** **Sept. 3, 1953, 213 U.N.T.S. 222** 6

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, ***opened for signature*** **9 June 1994, 3 IHRR 232** 10, 11, 24

International Covenant on Civil and Political Rights, ***ratified by U.S.*** **June 8, 1992 , 999 U.N.T.S. 171 (1966)** ..... *passim*

Report of the Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflicts**, 50th sess., U.N. GAOR, Human Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996)** 14

Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences**, 52nd Sess., U.N.GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996)** 11, 12,14

Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., OEA/Ser.L/V/11.88, Doc. 10 rev. (1995) 14

Summary Record of the 1401st Meeting: United States of America, CCPR/C/SR.140 (17/04/95) 16

Summary Record of the 1405th Meeting: United States of America, CCPR/C/SR.1405 (24/04/95) 16

Summary of the Record of the Human Rights Committee,U.N.Doc. CCPR/C/79/Add.95 (1998) (Algeria) 9

Summary of the Record of the Human Rights Committee,U.N. Doc. CCPR/C/79/ Add.99 (1998) (Belgium) 9

Summary of the Record of the Human Rights Committee, U.N. Doc. CCPR/C/79/Add.107 (1999) (Costa Rica) 9

Summary of the Record of the Human Rights Committee, U.N. Doc. CCPR/C/79Add.98 (1998) (Iceland) 9

Summary of the Record of the Human Rights Committee,U.N. Doc. CCPR/C/79/Add.94 (1998) (Italy) 9

Summary of the Record of the Human Rights Committee,U.N. Doc. CCPR/C/79/Add.102 (1998) (Japan) 9

Summary of the Record of the Human Rights Committee, U.N. Doc. CCPR/C/79/Add.109 (1999) (Mexico) 9

Summary of the Record of the Human Rights Committee, U.N. Doc. CCPR/C79/Add.89 (1998) (Zimbabwe) 9

Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, U.N. Doc. A/Conf.39/27 at 289 (1969), 1155 U.N.T.S. 331 5

Vienna Declaration and Programme of Action, General Assembly, World Conference on human Rights, U.N. Doc. A/Conf.157/23 (12 July 1993)..... 25

MISCELLANEOUS

Hilary Charlesworth, *The UN Declaration on Violence Against Women*, AM. SOC. OF INT'L L. INSIGHT (1994) 26

Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 61 (1993) 26

Rhonda Copelon, *Recognizing the Egregious In The Everyday: Domestic Violence As Torture*,, 25 COL. HUMAN RTS. L. REV 291-367 (1994) 26

Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L. J. 507 (1993) Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424 (1993**Michellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act,* 146 U. PENN. L.REV., 1097 (1988)** 15

Louis Henkin, Richard C. Pugh, Oscar Schachter, Hans Smit, INTERNATIONAL LAW (2nd ed. 1987)..... 5

Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992) 15

Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424 (1993) 26

Jordon J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. L. J. 51, (1992) 5,21,24

Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law in* REBECCA J. COOK, ED., HUMAN RIGHTS OF WOMEN: NATIONAL

AND INTERNATIONAL PERSPECTIVES 85-115 (1994) 26

Dorothy O. Thomas and Mishele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36 (1993) 26

Katherine Adrienne Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943 (1997) 26

MANFRED NOWAK, U.N. CONVENTION ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY (1993) 13

On the Record Briefing by Director Bonnie J. Campbell, Violence Against Women Office, Department of Justice. Sept. 12, 1995..... 26

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) ..... *passim*

U.S. Dep't of Justice, *Excerpts From Attorney General Janet Reno's Testimony Before the Senate Judiciary Committee May 15, 1996* (visited Nov. 9, 1999 <<http://www.doj.gov/vawo/ag796.htm>>..... 17

White House, Office of the Vice President, *Vice President Gore Announces $223 Million in Grants to Help Detect and Stop Violence Against Women* (visited Nov. 9, 1999)

<<http:///www.pub.whitehouse.gov/uri.res /I2R?urn:pdi://om.eop.gov.us/1999/3/2/4.te xt.1> 17

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 36 international legal scholars and human rights experts.[1] *Amici* include law professors and scholars who have studied and contributed as jurists to the development of the international law respecting human rights and the recognition of violence against women as a violation of human rights. Some of the *amici* currently hold positions as independent experts elected to human rights treaty bodies of the United Nations and the Inter-American system that are charged with implementing human rights, and one has recently completed a report on violence against women as a United Nations Special Rapporteur. The *amici* also include human rights experts and advocates, who have dedicated their lives to building the legal foundations of universal human rights protections, and have participated in various ways to the drafting and adoption of major UN and Inter-American instruments recognizing violence against women, inflicted by private persons as well as by officials as one of the paramount violations of international human rights today. Finally, there are among the amici international law scholars who have focused on the relation between the constitutional powers of the federal government and the international commitments of the United States.

Amici underscore the importance of sustaining Congressional power to enact the Violence Against Women Act (VAWA), and particularly the federal civil rights action, as fundamental to fulfilling the United States' mutual binding commitments under international law both to the elimination of violence against women and to respect for the rule of law.

---

[1] The background and work of the *amici* is contained in the attached letter to the Clerk of the Court. No counsel for any of the parties authored any part of this brief and there were no monetary contributions to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

Congress has unquestioned authority to enact legislation to meet both international treaty and customary law obligations, and need not state the sources of its authority for legislation to be valid. U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR), and other treaties, empowers Congress to enact legislation implementing the treaty. The text of the treaty, in conjunction with subsequent unanimous and binding interpretations by the international community, make clear that the ICCPR requires the U.S. to provide protection from gender-based violence from both private persons and public officials. Moreover, that the Executive Branch has confirmed this view in international proceedings is entitled to great deference.

In addition, the emergence in customary international law of a clear norm recognizing women's right to live free of gender-based violence, provides additional constitutional authority for the enactment of the federal civil rights cause of action at issue in this case. Under Article III, section 2, clause 1 of the Constitution, the federal courts have authority over all cases arising under the "laws of the United States" which include customary international law. In particular, Congress has authority to enact VAWA under both the Define and Punish Clause and under its power under the Necessary and Proper Clause to enact legislation enabling the federal courts to exercise its Article III jurisdiction over violations of customary international law.

It is also well-settled and fundamental to the US constitutional system that, whenever possible, domestic law should be interpreted so as to enable the U.S. to fulfill its international obligations. This principle strongly supports an interpretation of both the Commerce Clause and Section 5 of the Fourteenth Amendment that would confirm Congressional authority to enact VAWA and similar implementing legislation

ARGUMENT

I. VAWA Is A Constitutional Exercise Of The Congressional "Treaty Power" Which Implements U.S. Obligations Under The International Covenant On Civil And Political Rights (ICCPR) To Redress Gender-Based Violence.

A. Congress Is Constitutionally Authorized To Enact Legislation To Fulfill U.S. Treaty Obligations.

It is well established that Congress has the authority to enact legislation that is "necessary and proper" to meet the United States' obligations under ratified treaties, and that the existence of a valid treaty gives Congress authority to legislate over the subject matter thereof. *Missouri v. Holland*, 252 U.S. 416 (1920). This is so whether or not the Constitution provides another source of Congressional power. *Id.* at 432 ("[I]t is not lightly to be assumed that, in matters requiring national action, a 'power which must belong to and somewhere reside in every civilized government' is not to be found.") (internal citations omitted). *See also*, *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (The treaty power "extend[s] to all proper subjects of negotiation between our government and other nations.").

Congress need not state the ground of authority for legislation so long as a court is able to "discern some legislative purpose or factual predicate that supports the exercise of that power." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 244, n.18 (1983). This principle applies whether Congress has identified a different

source of authority for the legislation, or none at all. *Id.* at n.18. Indeed, as long as "Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant." *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Coger v. Bd. of Regents of the State of Tenn.*, 154 F.3d 296, 302 (6th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698 (1st Cir. 1983).

B. The ICCPR Guarantees The Right To Be Free From Gender-Based Violence and Obligates States Parties To Provide Remedies For Private And Official Gender-Based Violence.

The International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), which was ratified by the United States on June 8, 1992,[1] guarantees a range of rights that parallel Fourteenth Amendment rights and encompass the right to be free from gender-based violence. Moreover, under the Covenant, the U.S. committed itself to prevent not only official action perpetrating violence against women, but also to protect individuals from privately-inflicted violence and to provide remedies therefor. The VAWA cause of action is such a remedy.

A treaty is interpreted according to the "ordinary meaning" of its terms in their "context[s] and the light of its object and purpose;" moreover, under international law, subsequent agreements and State practice are particularly important determinants of treaty interpretation. [2] All of these sources

[1] International Covenant on Civil and Political Rights, *ratified by U.S.* June 8, 1992 , 999 U.N.T.S. 171 (1966) [hereinafter "ICCPR at __"].

[2] Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, at art. 31, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331, [hereinafter "Law of Treaties at __"]. ("The Vienna Convention on the

confirm that the Covenant guarantees the right to be free from gender-based violence.

1. The ICCPR Requires States Parties to Redress Privately Inflicted Gender-Based Violence.

The ICCPR requires the U.S., as a State Party, to protect against both official and private violations of the Covenant. Art. 2(1) of the ICCPR obligates the State to both "respect and to *ensure* to all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . ." ICCPR at art. 2. (emphasis added). The Human Rights Committee, which is the treaty body charged with interpreting the Covenant,[3] explained in General Comment 3 that the States' obligations under the treaty are "not confined to the respect for human rights, [rather, States Parties] have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U. N. DOC HRI/OEN/I/Rev.2 (29 March 1996) at Part I, Comment 3(1) [hereinafter "*Compilation* at Part___, Comment (or Recommendation) ___"]. The term "respect" in human rights treaties imposes a

Law of Treaties, concluded in 1969, is the principle authoritative source of the law of treaties..."); LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER, HANS SMIT, INTERNATIONAL LAW 416 (2nd ed. 1987). ("[T]he Department of State, in submitting the Convention to the Senate, stated that the Convention 'is already recognized as the authoritative guide to current treaty law and practice.'"(citing S. EXEC. DOC. L. at 1 (1971))); *see also*, Jordon J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. L. J. 51, 308, 381-82.(1992) [hereinafter "J. Paust, *Private Duties* at ___"].

[3] ICCPR at art. 40(4).

negative obligation; "respect" used in this context refers to the State obligation to refrain from directly interfering with the exercise of a right or infringing upon a right. The term "ensure," however requires a State, *inter alia*, to protect individuals from private actors infringing on the right; thus, it imposes a positive obligation on States.[4]

General Comment 4 makes clear that the guarantee of equal enjoyment of the rights enumerated in Article 3 of the Covenant "requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights." *Compilation* at Part I, Comment 4(2). General Comment 18 requests States Parties to report to the Human Rights Committee any problems of "discrimination . . . practiced either by public authorities, by the community, or *by private persons or bodies*." *Compilation* at Part I, Comment 18 (9) (emphasis added).[5]

---

[4] The "respect" and "ensure" language also appears in the American Convention on Human Rights, *entered into force* July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. L/V/II.23 Document Revision 2, 1144 U.N.T.S. 123, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222. In both systems, "ensure" has been similarly interpreted to require prevention and punishment of private interference with protected rights. *See, Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. 35, Ser. C, No. 4,OAS/Ser.L/V/III.19, doc. 13 (1988); *X & Y v.The Netherlands*, Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986) (State must afford remedies for private sexual assault of a mentally disabled person.).

[5] In addition, the Human Rights Committee adopted the definition of discrimination found in the Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 20378 ["hereinafter "Women's Convention at __"], which includes "*any* distinction, exclusion or restriction made on the basis of sex which has the *effect* or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

The unanimous approval by the U.N. General Assembly of the *Declaration on the Elimination of Violence Against Women*, U.N. GAOR Res. 104, 48th Sess., U.N. Doc. A/Res/48/104 (1994) (hereinafter "*Declaration on Violence* at___") explicitly and unequivocally interprets the ICCPR to require states to guarantee the right to be free from gender-based violence. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2nd Cir. 1980) (relying on the Declaration Against Torture as interpreting the ICCPR).

2. The ICCPR Protects the Right To Be Free From Gender-Based Violence.

Under the Covenant, gender-based violence is an extreme form of gender based discrimination which also violates a broad range of other fundamental rights, largely paralleling Fourteenth Amendment rights, privileges and immunities.

The ICCPR requires a State Party to respect and ensure all rights free from all forms of discrimination, including distinction on the basis of sex, ICCPR at art. 2; to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights" protected by the treaty, *id.* at art. 3; and to ensure "[a]ll persons shall be equal before the courts." *Id.* at art. 14. Furthermore, article 26 of the ICCPR guarantees not only equal protection of the laws, but also "equal and effective protection against discrimination." *Id.* at art. 26. [6] ICCPR article 23 provides that State Parties "shall

---

economic, social, cultural, civil or any other field." *Id.* at art. 1 (emphasis added).

[6] These articles of the ICCPR provide parallel and intersecting protection for discrimination on the basis of race. In addition, the Convention on the Elimination of All Forms of Race Discrimination, *entered into force Jan. 4, 1969 and ratified by the U.S. on Oct. 21 1994*, 660 U.N.T.S. 195 (1966) [hereinafter "CERD at__"), would provide further constitutional

take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution." *Id.* at art. 23. Finally, non-discrimination based on sex is a non-derogable right under the ICCPR. *Id.* at art. 4(1).

The Covenant also explicitly protects the rights to life, liberty and security of person; the freedom from slavery or servitude in all its forms; torture, and other cruel inhuman or degrading treatment or punishment; the rights to liberty of movement and choice of residence; the rights to freedom of thought, belief, expression, information and association; the right to protection of and equality in family life; and the right to take part in the conduct of public affairs.[7] Separately and together these rights provide broad protection against gender-based violence, including, but not limited to, the type of gender-based violence for which VAWA provides a civil cause of action.

The *Declaration on Violence* interprets the ICCPR by announcing "a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms." *Declaration on Violence* at Preamble. Significantly, it cites the ICCPR as the source of the State obligation to prohibit gender-based violence and repeats many of the above-listed rights verbatim. *See Declaration on Violence* at art. 3.[8]

---

basis for Congressional enactment of VAWA to the extent that racial discrimination affects access to justice in the state courts for victims of gender violence.

[7] *See* ICCPR at art. 6; art. 9; art. 8; art. 7; art. 12, art. 18, art. 23, and art. 25.

[8] Specifically, the rights listed in the *Declaration on Violence* are the right to life, equality, liberty and security of the person, equal protection under the laws, freedom from all forms of discrimination, highest attainable standard of physical and mental health, just and favorable work conditions, and the right to not be subjected to torture, or other cruel,

The U.N. Human Rights Committee, when considering States' reports on compliance,[9] routinely inquires of States Parties about the incidence of and measures taken to address gender-based violence. In its comments on the U.S. report, discussed below, the Human Rights Committee specifically lauded VAWA as an important step to meeting ICCPR obligations. *See infra*, § __ ___. In response to quadrennial State reports over the last two years, the Human Rights Committee has made it clear to dozens of states that providing remedies for gender-based violence is mandated under the Covenant.[10]

Additionally, the Human Rights Committee gives particular weight to the jurisprudence of the U.N. Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[11] which interprets the Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* 3 Sept. 1981, 1249 U.N.T.S. 20378 ["hereinafter "Women's Convention at __"].[12] CEDAW issued

---

inhuman or degrading treatment or punishment. *See Declaration on Violence* at art. 3.

[9] Pursuant to ICCPR art. 40.

[10] *See, e.g.*, Summary of the Record of the Human Rights Committee,U.N. Doc. CCPR/C/79/Add.95 (1998) (Algeria); U.N. Doc. CCPR/C/79/ Add.99 (1998) (Belgium); U.N. Doc. CCPR/C/79/Add.107 (1999) (Costa Rica); U.N. Doc. CCPR/C/79Add.98 (1998) (Iceland); U.N. Doc. CCPR/C/79/Add.94 (1998) (Italy); U.N. Doc. CCPR/C/79/Add.102 (1998) (Japan); U.N. Doc. CCPR/C/79/Add.109 (1999) (Mexico); U.N. Doc. CCPR/C79/Add.89 (1998) (Zimbabwe).

[11] *Compilation* at Part I, Comment 1.

[12] Under the Convention, CEDAW is charged with reviewing State reports and making "suggestions and general recommendations based on the examination of reports and information received from State parties." Women's Convention at art. 18-21.

a General Recommendation on "Violence Against Women" which both recognizes gender-based violence as an extreme form of discrimination, and affirms that the specific rights contained in the ICCPR are applicable to gender-based violence. *Compilation* at Part IV, Recommendation 19(7).[13] The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, [hereinafter "Belem do Para"] adopted by acclamation of the General Assembly of the Organization of American States, also cites these rights.[14] These interpretive developments, as well as other State practice, discussed in Section ___, *infra*, demonstrate the uncontested application of the ICCPR to gender-based violence.

Thus, under the ICCPR, the State failure to protect against gender-based violence violates a broad range of equality rights applicable to both the public and private life. The legislative history of VAWA details the myriad of ways in which such violence operates as a tool of discrimination, as well as how gender-based discrimination obstructs women's access to the state courts. S. REP. NO. 103-138, 42-43(1993) [hereinafter "S.R. at __"]. Likewise, the *Declaration on Violence* and CEDAW Recommendation on violence against women recognizes violence against women as a severe form of discrimination. *Compilation* at Part IV, Recommendation 19.

---

[13] General Recommendation 19 finds that the "right to life," the "right not be subject to torture or cruel, inhuman or degrading treatment or punishment," the "right to equal protection," and the "right to liberty and security of person," all protect against gender-based violence. *Compilation* at Part IV, Recommendation 19(7).

[14] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *opened for signature* 9 June 1994, 3 IHRR 232 at ____ [hereinafter "Belem do Para at ___"].

Gender-based violence in intimate relationships, having both the purpose and effect of subordinating the woman, nullifies the right to equality in marriage and domestic partnerships. S.R. at 36-39. Creating a federal cause of action, like VAWA, is an effort both symbolically and practically to repudiate acceptance of and end impunity for gender-based violence, which is indispensable to ensuring the equality of women. S.R. at 36-39.

The right to life, guaranteed by Art. 6 of the ICCPR, is also clearly violated by State failure to protect against gender-based violence. The Human Rights Committee makes it clear that the right to life applies to *de facto* systemic causes of death (and not simply the death penalty), to official as well as private encroachment and requires states to adopt positive measures. *Compilation* at Comment 6. The legislative history of VAWA contains findings that gender-based "violence accounts for a significant number of murders in this country and that one-third of all women who are murdered die at the hands of a husband or boyfriend." S. R. at 42-43, 129[15]

The right to liberty, protected by Article 9, is related to the "the right to liberty of movement and freedom to choose h[er] residence under Article 12[16] as well as a broad range of other

---

[15] *See also Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, at ¶ 60, 52nd Sess., U.N.GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996) ("[W]omen victims of domestic violence are being murdered by their batterers with increasing frequency . . .Studies conducted in . . . the United States of America document the reality of femicide committed within the domestic sphere.").

[16] The Human Rights Committee's General Comment 8 on Article 9 makes clear that this right applies not only to official detention, but also to "other cases in which an individual claims to be deprived of h[er] liberty in violation of the Covenant." *Compilation* at Comment 8.

explicit rights. Accordingly, State failure to protect against gender-based violence may violate the right to liberty because it reinforces "a battered woman's fear of precipitating deadly violence against herself or her children [that] may make escape dangerous." *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, at ¶ 46, 52nd Sess. U.N. GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996). Indeed, the Senate Report specifically found that "[g]ender-based violent crimes and fear of gender-based crimes restrict movement." S.R. at 39. Additionally, gender-based violence -- both intimate violence and that inflicted by acquaintances and strangers in workplaces, schools and the community -- is directed at controlling women's actions and statements. It prevents and inhibits them from traveling, working, and participating in public life, S.R. at 37, 42-43. It also obstructs their ability to obtain information or an education, or to express thoughts or beliefs, all of which are aspects of equality and liberty protected by the Covenant. *Id.* at 43-44.

The right to security of person, also guaranteed by Article 9 of the I, is not limited to formal deprivation of liberty, but protects physical and mental integrity from invasion by both official and private persons. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 162-166 (1993) [hereinafter "Nowak at __"]. Congress found that at least one million women a year require health care services for injuries and disabilities—some permanent-- caused by intimate partners. This statistic does not include the ongoing devastating effects of trauma. S.R. at 31, 37. Also contrary to the protection of privacy guaranteed by ICCPR

article 17, gender-based violence inflicts severe physical and psychological harm.[17]

The right to be free from torture and cruel, inhuman or degrading treatment, protected by ICCPR article 7, also encompasses gender violence.[18] Again, the Human Rights Committee clearly states that this right requires the State to afford everyone protection against torture and ill treatment, "whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity." *Compilation* Part 1, General Comment 20 at ¶ 2. Moreover, is "not sufficient [for the State] to make [torture] a crime." *Id.* at ¶ 8. The Comment notes that the characterization of ill-treatment depends on its "nature, purpose, and severity," *id.* at ¶ 4, that it and may occur in many contexts, including teaching and medical institutions, *id.* at ¶ 5. Rape and other forms of sexual violence by private actors have been treated as

---

[17] The Senate Report contains chilling findings on the prevalence of intimate violence, indicating that 3 to 4 million women are abused each year and between 2,000 and 4,000 are killed by their partners. S.R. at 36-37. Absent effective protection, women are denied even the sanctuary of their homes, and are terrorized within their families. *See* 140 Cong. Rec. H4724-02, *H4724 (1994) ("[C]an you imagine living a life where not only was the street unsafe, home was more unsafe than the street? [This is] domestic terrorism.") (statement of Rep. Schroeder).

[18] Ratified by the U.S. on Nov. 20, 1994, the Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides an alternative source of treaty power for the enactment of VAWA, making the U.S. responsible for such private violence under the treaty when it has ordered, instigated, consented or *acquiesced* therein. (emphasis added). *See* Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered in force* Nov. 20, 1994 at Art. 1. [herinafter "CAT at ___"] It further obligates states to take "effective, legislative, ...[and] judicial measures to prevent acts of torture..." *id.* art. 2(1), and to ensure civil redress for its victims, *id.* at art. 14(1).

torture in other contexts.[19] Severe unredressed domestic violence may also constitute torture or ill-treatment.[20] Extreme forms of gender violence also amount to privately inflicted servitude or slave-like conditions which violate the ICCPR irrespective of any State involvement.[21]

---

[19] Under art. 5(2) of the American Convention on Human Rights, which parallels ICCPR art. 7, torture includes rape by para-militaries and criminal elements allowed to operate with impunity. *See Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., OEA/Ser.L/V/11.88, Doc. 10 rev. (1995) at §§ 128-133 [hereinafter "Haiti Report at __"]; *see also Aydin v. Turkey*, Eur. Ct. H.R., 25/09/1997 (treating rape as torture under the European Convention). The United Nations Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflicts, has also made explicit findings regarding rape as a form of torture. *See Report of the Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflicts*, at ¶ 53-55, 50th sess., U.N. GAOR, Human Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996). Likewise, in the *ad hoc* International Criminal Tribunals, rape has been held or identified as a from of torture in judgements. *See Prosecutor v. Furndzija*, Case No. IT-95-17/1-T (Judgment Dec. 10, 1998)' *Prosecutor v. Celebici*, Case No. IT-96-21-T (Judgement Nov. 16, 1998); *and Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment Sept. 2, 1998).

[20] "[D]epending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture or cruel, inhuman and degrading treatment or punishment under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." Special Rapporteur at ¶ 42. Both "the battered woman and the prisoner live isolated under a reign of terror and impairment as well as often profound and lasting psychological debilitation." *Id.* at ¶ 46. "[T]he lack of resources, legal and community support and alternative means to survive may make escape seem impossible as well as reinforce her shame, hopelessness, and sense that she deserves this treatment." *Id.* at ¶ 44.

[21] Gender violence may also be examined under the Thirteenth Amendment. It is sometimes severe enough to constitute a form of involuntary servitude in itself. But beyond that, the continued occurrence of gender violence together with the discriminatory treatment by the courts of the women who are its victims constitutes a badge and incidence of slavery. *See generally*, Michellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PENN.

C. The ICCPR Calls For Judicial Remedies, Such As VAWA, To Redress Gender-Based Violence.

Article 2 of the ICCPR requires States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* at art. 2. It calls upon each State Party to ensure to any person whose rights have been violated, whether by state officials or private persons, "an effective remedy," to be "determined by competent judicial, administrative or legislative authorities or other competent authority." ICCPR at art. 2(3)(a) and 2(3)(b).

Indeed, the Covenant envisions a VAWA-type cause of action, calling upon states "to develop the possibilities of judicial remedy." ICCPR at art. 3. The *Declaration on Violence* affirms this, endorsing "civil . . . domestic legislation... to punish and redress the wrongs caused to women who are subjected to violence." *Declaration on Violence* at art. 4(d). The CEDAW Recommendation on violence against women likewise emphasizes "civil remedies and compensatory provisions." *Compilation* at Part IV, Recommendation 19.

D. The Executive's Identification of VAWA As Responsive to U.S. Obligations Under The ICCPR Should Be Given Great Weight.

L.REV., 1097 (1988) *and* Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992); *see also Jones v. Mayer*, 392 U.S. 409 (1968). Prior to the 19th century, women had a chattel- or slave-like status under the common law and their husbands had the power to control them; central to this power was "the right to use violence with a stick no greater than the thumb." *See, e.g. State v. Rhodes*, 61 N.C. 453 (Phil. Law 1868). This Court has also implicitly suggested that current legal manifestations of women's traditional common-law status implicate Thirteenth Amendment rights. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 897-898 (1992).

Given the Executive Branch's special constitutional role in negotiating and enforcing treaties, the Court gives Executive interpretations of ratified treaties great weight. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."); *see also, Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

Here, the Executive Branch has taken the official position that the ICCPR obligates States parties to provide remedies for gender-based violence and that VAWA is implementing legislation to meet U.S. obligations. In connection with the first U.S. Report to the Human Rights Committee on U.S. compliance with the treaty, the Executive emphasized VAWA as a measure undertaken to comply with ICCPR obligations.[22] The Justice Department spokesperson described the Act as "the most comprehensive federal effort in its field," and noted especially the civil cause of action for gender-based violence.[23]

The Executive also affirmed its commitment to comply with the ICCPR and "extend [the Covenant] to all parts of the federal states without limitations or exceptions" in its Report to the Human Rights Committee, regarding implementation of the ICCPR through Article 50. Concluding Observations of the Human Rights Committee: United States of America, at ¶ 277, CCPR/C/79/Add.50 (3/10/95) [hereinafter "Concluding Observations at ¶ ___"]. The U.S. spokesperson stated that while federalism concerns would not permit the federal

[22] Summary Record of the 1401st Meeting: United States of America, at ¶ 29, CCPR/C/SR.140 (17/04/95).

[23] *Id.*

government to obligate the states to undertake particular actions -- such as "dictating the basic form or internal workings of state government" -- federal responsibility did extend to "enforc[ing] uniform standards for the respect of civil and political rights". [24] Accordingly, VAWA does not mandate state action, but rather, as noted by U.S. officials, works in partnership with states and complements state jurisdiction. [25] In turn, the Committee's concluding comments "note[] with satisfaction the assurances of the [U.S.] Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States." Concluding Observations at ¶ 277.

Because the Executive Branch's interpretation of the treaty was part of the official reporting process, it also constitutes State practice and conduct and is thus further evidence of the treaty's meaning. *O'Connor v. U.S.*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."); *see also*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES at § 325 (2) (1986). ("[S]ubsequent practice between the parties in the application of the agreement, [is] to be taken into account in its interpretation.").

[24] Summary Record of the 1405th Meeting: United States of America at ¶ 10 CCPR/C/SR.1405 (24/04/95).

[25] *See, e.g.*, White House, Office of the Vice President, *Vice President Gore Announces $223 Million in Grants to Help Detect and Stop Violence Against Women* (visited Nov. 9, 1999) <<http:///www.pub.whitehouse.gov/uri.res/I2R?urn:pdi://oma.eop.gov.us/1999/3/2/4.text.1>; U.S. Dep't of Justice, *Excerpts From Attorney General Janet Reno's Testimony Before the Senate Judiciary Committee May 15, 1996* (visited Nov. 9, 1999) <<http://www.doj.gov/vawo/ag796.htm>>.

II. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT VAWA TO IMPLEMENT INTERNATIONAL CUSTOMARY LAW OBLIGATIONS.

A. The Define and Punish Clause of the U.S. Constitution Authorizes Congress To Enact Legislation to Fulfill Customary Law Obligations.

Art. 1, Section 8, clause 10 of the Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations." This Court stated: "The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is explicitly authorized 'to define and punish ...' offenses against the law of nations." *U.S. v. Arjona*, 120 U.S. 479, 483 (1887).[26] This clause "authorize[s] Congress to derive from the often broadly phrased principles of international law a more precise code as it determines that to be necessary to bring the United States into compliance with rules governing the international community." *Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986), *rev'd on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988).

The concept of "Offenses Against the Law of Nations" embraces customary international law and includes civil as well as criminal remedies. This Court took note of Congress's citation to the Define and Punish Clause, *inter alia*, as authority for its enactment of the Foreign Sovereign

[26] *Arjona* also stated Congress did not have to identify the Define and Punish Clause so long as Congress defined the offense and the U.S. had an international legal obligation to prevent it. *Arjona*, 120 U.S. at 483.

Immunities Act (FSIA) regulating federal court actions cognizable under Article III, sec. 2, cl. 1. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). In passing the Torture Victim Protection Act (TVPA), Congress again explicitly cited to the Define and Punish Clause as authority to create a civil cause of action for torture and extrajudicial execution. *See* S. REP. No. 102-249 (1992).

Additionally, as the Second Circuit recognized in its landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (1980), when Congress provides only a civil remedy for an offense against human rights, the conduct complained of still retains " its character as an international law violation." *See also*, *Trible v. Stone*, 187 F.Supp 483, 485 (D.D.C. 1960) (Basic human rights do not depend on nomenclature.").

Congressional power under the Define and Punish Clause clearly authorizes sanctions on private conduct that the United States is required to prevent under international law. For example, in *Arjona*, the Court found that although the international counterfeiting prohibition applied only to States, the Define and Punish Clause provided adequate constitutional authority for the criminal statute [punishing private counterfeiting] because the United States had the "obligation ... to punish those who, within its own jurisdiction, counterfeit the money of another nation." *Arjona*, 120 U.S. at 484.[27] Similarly, courts have consistently upheld federal prohibitions on private protests or harassment of foreign embassies or

[27] "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation . . . ." *Arjona*, 120 U.S. at 484.

diplomats under the Define and Punish Clause[28] even though the protestor or individual harassing foreign diplomats is not the direct "violator" of the law of nations. *Frend v. United States,* 100 F.2d 691, 693 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939).

Thus, VAWA is a proper exercise of Congressional authority under the Define and Punish Clause. It creates a civil remedy to redress conduct customary international law condemns as criminal and which states are required to sanction. *See* § III below. As with counterfeiting foreign currency and harassment of diplomats and foreign missions, "nations have made it their business, both through international accords and unilateral action, to be concerned with domestic human rights violations..." *Filartiga,* 630 F.2d at 889. This principle applies to gender-based violence.

B. The Necessary and Proper Clause Authorizes Congress To Confer Article III Jurisdiction On The Federal Courts To Implement Customary Norms.

Since VAWA provides a federal judicial remedy for violation of the customary norm condemning gender-based violence, *see infra* § III, it is an appropriate exercise of Congress's power under the Necessary and Proper Clause to "carry...into

[28] *Boos v. Barry*, 485 U.S. 312, 323 (1988) ("The constitution itself attempts to further this interest [of the United States to comply with international law] by expressly authorizing Congress 'to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations'...Moreover, protecting foreign emissaries has a long history and noble purpose."); *Finzer v. Barry*, 798 F.2d 1450, *rev'd on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988); *Jewish Defense League Inc. v. Washington*, 347 F. Supp. 1300 (D.D.C. 1972); *Frend v. United States,* 100 F.2d 691 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939).

Execution...all other Powers vested by [the] Constitution in the Government of the United States."[29] U.S. Const. art. I, § 8, cl. 18. Art. III, Section 2, clause 4 of the Constitution vests federal courts with jurisdiction over cases "arising under the laws of the United States," which includes customary international law.

Throughout the last two centuries the Court has consistently affirmed the principle that customary international law is part of the "laws" of the United States as understood by Article III, section 2, clause 1. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), although dealing with the expediency of states to ascertain international law, the Court stated that the U.S. was responsible to other countries for the "conduct of each State, relative to the laws of nations, and the performance of treaties." Reinforcing the obligation is *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796), stating "[w]hen the United States declared their independence, they were bound to receive the law of nations..." The Court explicitly affirmed the status of customary international law in *The Nereide*, 9 U.S. (9 Cranch) 388, 423 (1815), saying, "[T]he Court is bound by the law of nations which is a part of the law of the land." Moreover, in *The Paquete Habana*, 175 U.S. 677, 700-701 (1900) this principle was further elucidated: "[i]nternational law [which includes customary law] is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction...".[30]

[29] This power is a flexible grant to Congress to perform its duties under the laws of the nation. *McCulloch v. Maryland,* 17 U.S. 316, 324 (1819) ("[T]he grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted."). *See also Graham v. Deere,* 383 U.S. 1, 6 (1966); *Yakus v. United States,* 321 U.S. 414, 425 (1944).

[30] *See Filartiga,* 630 F.2d at 885 ("the law of nations . . . has always been a part of federal common law") *and Xuncax v. Gramajo,* 886 F.

In cases involving the Alien Tort Claims Act lower courts have consistently found that Congress may appropriately provide jurisdiction to the federal courts for the enforcement of customary law. [31] VAWA, like ACTA, defines a specific remedy for already recognized rights under human rights law and thus is not "granting new rights ... but simply opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga,* 630 F.2d at 887.

III. ENSURING THE RIGHT TO BE FREE FROM GENDER BASED VIOLENCE IS AN OBLIGATION UNDER INTERNATIONAL CUSTOMARY LAW.

A. U.S. Courts Have Consistently Recognized The Appropriate Sources For Discerning Customary Law.

From its earliest jurisprudence, this Court has articulated widely accepted international principles for the discernment of customary international law. *The Paquete Habana*, 175 U.S. at 700. [32] More recently, courts have relied on article 38 of the

---

Supp. 162, 179 (D. Mass. 1995). *See also, Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-24 (1964); *Blackmer v. United States,* 284 U.S. 421, 437 (1932); *United States v. Arjona,* 120 U.S. 479, 484-85 (1887); *Kadic v. Karadzic* ,70 F.3d 232 (2nd Cir. 1995), *cert. denied, Karadzic v. Kadic,* 518 U.S. 1005 (1996); *Garcia-Mir v. Meese,* 788 F.2d 1446, 1453 (11th Cir. 1986); *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1542 (N.D. Cal. 1987); J. Paust, *Private Duties* at 34-48.

[31] *See Filartiga* 630 F.2d at 887; *see also, Gramajo,* 886 F.Supp. at 179 (ACTA "grants both federal private cause of action as well as a federal forum in which to assert the claim.).

[32] This Court has also instructed that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted

Statute of the International Court of Justice.[33] *See, e.g. Filartiga*, 630 F.2d at 881.

One of the most comprehensive statements on sources of customary human rights law is now found in the RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES (1986). Significantly, the Restatement notes: "the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally." *Id.* at § 701. The Restatement sets out the following categories of sources:

> [1] [V]irtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights;
>
> [2] the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa;
>
> [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law;

---

with the subjects of which they treat." *The Paquete Habana*, 175 U.S.at 700.

[33] Article 38 provides that:
The Court, whose function is to decide in accordance to international law ...shall apply: (a) international conventions...establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted by law; (c) the general principles of law recognized by civilized nations; and (d)... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

[4] action by States to conform their national law or practice to standards or principles declared by international bodies... [and]

[5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions, and other diplomatic communications. . . *Id.* at Reporter's Notes ¶ 2.

These sources consistently reaffirm the customary norm prohibiting gender-based violence and the State obligation to provide civil remedies for such violations.

B. Gender-Based Violence Violates A Customary Norm of International Law.

Widely ratified treaties, together with unchallenged interpretive declarations and statements thereto, are a powerful source of customary international law. *Id.* The widespread ratification of the ICCPR and CAT, discussed in Section I,[34] *supra*, constitutes compelling evidence of a customary norm guaranteeing against all forms of gender-based violence and imposing responsibility on States to redress it through VAWA-type remedies.[35] Beyond the treaties ratified

[34] For example, 144 States have ratified the ICCPR, and 118 States have ratified the CAT -- which impose obligations on states to enact remedies for gender-based violence. *See supra* § I.

[35] This Court found in *Filartiga*, that the ICCPR, at that time not yet ratified by the United States, constituted evidence of the human rights prohibition on torture. 630 F.2d at 884. Thus, the ICCPR, the CAT, and the Women's Convention -- as interpreted by CEDAW's General Recommendation no. 19 and the *Declaration on Violence* -- are evidence of a customary norm prohibiting all forms of gender-based violence and imposing obligations on States to take action to eliminate it. *See supra* § IA; *see also*, J. Paust, *Private Duties* at 22-23, 369.

by the U.S., the near unanimous ratification of the Women's Convention underscores this customary norm, as do regional treaties and resolutions. [36] For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women also declares the right to live free from gender-based violence, *see* Belem do Para at art. 3 and 6, and requires states to provide civil remedies. *Id.* at art. 7(d). The Declaration on the Elimination of Violence Against Women -- adopted unanimously by all the member States of the General Assembly of the United Nations –contributes to customary law both as an interpretation of the ICCPR, CAT and CEDAW and as evidence of state practice reflecting the "general assent of nations." *See Filartiga*, 630 F.2d at 884.

Further evidence of the "general assent of nations" is found in the continuing attention to gender violence in the U.N. human rights system. In 1994, the U.N. Human Rights Commission (hereinafter "Commission"), recognizing the need to eliminate gender violence as a priority concern, created the position of U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences. Every year since, the Commission has adopted resolutions endorsing her reports and emphasizing states' obligations to eliminate violence against women.[37] *See,*

[36] The Women's Convention has been ratified by 165 States.

[37] This "general assent" is also found in the consensus documents negotiated by virtually all member states at the recent series of United Nations World Conferences, which condemn gender violence and call for remedies without reservation. *See, e.g. Vienna Declaration and Programme of Action*, General Assembly, World Conference on Human Rights, U.N. Doc. A/Conf./57/23 (12 July 1993). *and Beijing Declaration and Platform for Action*, General Assembly Report of the Fourth World Conference on Women, U.N. Doc. HRV/GEN/1/Rev.2 (29 March 1996). In doing so, these conference agreements not only represent a programmatic consensus to take action, such as VAWA, to redress, prevent and eradicate the social problem of gender-based violence; they also recognize an international human rights obligation to do so.

e.g., U.N. GAOR, Hum. Rts. Comm., 55th meeting, U.N. Doc.E/CN.4/RES/1999/42 (1999), U.N. GAOR, Hum. Rts. Comm., 52nd meeting, U.N. Doc. E/CN.4/RES/1998/52, (1998); U.N. GAOR, Hum. Rts. Comm., 57th meeting. U.N. Doc. E/CN.4/RES/1997/44 (1997).

Moreover, States around the globe have taken action to create legal mechanisms to address gender-based violence. "In most countries, . . . there exists at least one of three traditional legal mechanisms available to victims of domestic violence: criminal law, civil remedies, or matrimonial relief." U.N. GAOR, Human Rts. Comm., *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, 52nd sess., U.N. Doc. E/CN.4/1996/53 (1996) at ¶ 121.

Finally, the participation of the scholars and human rights experts as *amici curiae* in this brief, and their substantial work, *see supra* "Interests of the *Amici*," attest to the widespread recognition that gender violence constitutes one of the gravest, albeit long-ignored and still pervasive, violations of human rights and humanitarian law. [38]

[38] Selected additional scholarship includes the following: Hilary Charlesworth, *The UN Declaration on Violence Against Women*, AM. SOC. OF INT'L L. INSIGHT (1994); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 61 (1993); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1997); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L. J. 507 (1993); Dorothy O. Thomas and Mishele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36 (1993); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424 (1993); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in* REBECCA J. COOK, ED., HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85-115 (1994); *and* Katherine Adrienne Wing, *A Critical Race Feminist*

C. The Executive's Recognition Of Its Human Rights Obligation To Redress Gender-Based Violence Through VAWA Is Entitled To Deference.

The United States has played a leadership role in negotiating and reaffirming diplomatically the international recognition of gender violence as a violation of human rights as well as the need for states to provide remedies therefor. For example, the official United States spokeswoman on issues of gender violence at the Fourth World Conference on Women in Beijing stated:

> [D]omestic and sexual violence represent a major obstacle for women and contributes to the low social and economic status of women. When women are prevented by violence from participating fully within our families, our society, our economy, and our political structures, it will now be recognized as *violation of our human rights and fundamental freedoms*. [39]

She further identified VAWA as the primary example of a United States initiative addressing human rights violations

Conceptualization of Violence: South African and Palestinian Women, 60 ALB. L. REV. 943 (1997).

[39] On the Record Briefing by Director Bonnie J. Campbell, Violence Against Women Office, Department of Justice. Sept. 12, 1995. (emphasis added). Ms. Campbell made clear the administration's position that violence against women violates a number of fundamental human rights, including the right to be free from torture ("rape is a form of torture . .and a violation of human rights"), and the right to be free from gender discrimination ("the provision for 'equal sexual relations' is a vital element of our ability to deal with rape and sexual assault."). *Id.*

involving violence against women, noting specifically the federal civil rights remedy at issue here. *Id.*

IV. BOTH TREATY AND CUSTOMARY LAW SUPPORT INTERPRETING THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT AS CONFERRING AUTHORITY ON CONGRESS TO PROVIDE REDRESS FOR GENDER-BASED VIOLENCE.

Where, as in the instant case, there is no inevitable conflict with the Constitution, the obligation of the U.S. to respect and fulfill its international obligations should dispose the judiciary to read the Constitution to reconcile the two. As this Court has found, "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz,* 426 U.S. 67, 81 (1976). This is particularly true where, as here, the capacity to honor significant foreign policy and international commitments-- a priority concern since the founding of the Republic-- is at stake. *Missouri v. Holland*, 252 U.S. at 432.

For these reasons, "Courts in the United States have increasingly looked to international human rights standards as law in the United States or as a guide to United States law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, Reporter's Note at. ¶ 7 (1987). The reasoning underlying the principle stated by this Court in *The Charming Betsy*, 6 U.S. (2 Cranch) U.S. 64, 118 (1804) that "an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains," also supports constitutional interpretations that are consistent

with international law and allow Congress to meet international obligations. [40]

The principle favoring reconciliation applies with special force where constitutional history and precedents, including divided judicial opinions, provide support for constitutional interpretation that is consistent with international law. Without repeating the arguments of the appellants or other *amicus curiae* briefs, *amici* here note that appellees' argument that the Commerce Clause does not authorize the VAWA legislation would entail a marked departure from long-settled interpretations of the scope of the commerce power. Here, Congress and the Executive have recognized that gender violence significantly affects women's ability to participate in and contribute to the economic life of this nation as well as entails significant costs which affect interstate commerce. *See* Pet'r Brzonkala's Br. at § I. Under these circumstances, it is impermissible to read the Commerce Clause to invalidate an Act of Congress that advances our treaty and customary international commitments and is otherwise consistent with the Constitution, including the Tenth Amendment.

The same interpretive principle calls for reaffirming Congressional power under Section 5 of the Fourteenth Amendment to enact the VAWA cause of action. As the explicit constitutional vehicle through which Congress enforces the "privileges and immunities of citizens" as well as the rights to "equal protection" and "due process," Section 5 is a particularly appropriate source of power to implement the

---

[40] *See also, Lauritzen v. Larsen,* 345 U.S. 571, 578 (1953); *Garcia-Mir v. Meese,* 788 F.2d 1446, 1453 (11th Cir. 1986) ("To the extent possible, courts must construe American law so as to avoid violating principles of public international law.").

parallel international rights that comprise the human right to be free from gender violence.

Given the Congressional findings of discrimination in state courts for victims of gender violence, *see* Pet'r Brzonkala's Br. at § II, and settled Fourteenth Amendment jurisprudence protecting against such discriminatory access, Section 5 provides ample support for congressional authority to enact the VAWA cause of action. Further, given the US' international treaty and customary obligations to the community of nations, and to its people, to ensure redress for gender-based violences throughout the land, there can be no doubt as to the constitutionality of the federal civil rights remedy that VAWA creates.

WHEREFORE, the judgment of the Court below should be reversed.

Respectfully submitted,

Cathy Albisa
Rhonda Copelon*
*Counsel of Record
International Women's
Human Rights Law Clinic
City University of New York
School of Law
65-21 Main Street
Flushing, New York 11367
(718) 340-4300

Jenny Green
Peter Weiss
Center for Constitutional
Rights
666 Broadway
New York, New York 10012
(212) 614-6434

Special thanks to CUNY students Marina Citron, Annie Camett, Erin Gleason, Lisa Graybill, Annie Holmes, and Kimberly Jones.